82 NO. 1178

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLOYD ROOD

Petitioner,

versus

PETER FINNEY, JR., and
UNITED PRESS INTERNATIONAL

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I

Whether summary judgment against a public figure plaintiff was appropriate in an action for libel where the plaintiff was prevented from presenting direct evidence of actual malice in opposition to the motion for summary judgment.

II

Whether the failure to retract or correct an admittedly libelous statement can constitute a reckless disregard of the truth irrespective of whether there was actual malice in the initial publication.

PARTIES

Petitioner, Floyd Rood, is a person of the full age of majority and a resident of the State of Louisiana.

Respondent, United Press International, Inc., is a corporation doing business in the State of Louisiana.

Respondent, Peter Finney, Jr., is a person of the full age of majority and a resident of the State of Louisiana and at all times pertinent hereto, an employee of United Press International, Inc.

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NO. _____

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FLOYD ROOD

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SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Louisiana Supreme Court denying certiorari appears in Appendix p. A-8 hereto. The opinion the Louisiana Fourth Circuit Court of Appeals appears in Appendix p. A-2 hereto. The decision of the Civil District Court for the Parish of Orleans appears in Appendix p. A-1 hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on October 8, 1982. This petition

for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

United States Constitution, Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of greviences.

United States Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiff, Floyd Rood, is a 74 year old professional golfer. In the 1950's Mr. Rood established the Floyd Rood in Sports Foundation, a tax exempt organization devoted to youth assistance work, particularly those youths afflicted by drug addiction. One of the unique ways in which Mr. Rood raises money for Foundation activities is by engaging in "highway golf," that is, a promotional activity whereby Mr. Rood

would hit a golfball(s) cross country. Funds were raised through sponsors who would pay the Foundation an amount of money for each yard or mile covered by Rood or who would purchase the golf balls that Rood had used.

As a part of the promotion of these fund raising activities, Mr. Rood would give radio and television interviews as well as interviews with other aspects of the public media. At issue in this litigation is a newspaper article written by Peter Finney, Jr. (Finney, Jr.) on October 3, 1978, on the occasion of the beginning of one of Mr. Rood's "highway golf" tours, the purpose of which was to raise money to purchase a Narcotics Education Trailer to be used at various high schools.

After an interview with Mr. Rood, Peter Finney, Jr., an employee of United Press International (hereinafter referred to as UPI), typed his story into a video display terminal in the New Orleans UPI office. After a review of the article, the story was transmitted by computer command over telephone lines to the UPI office in Dallas, a regional editing center for UPI.

According to the deposition testimony of Mr. Finney, Jr., the third paragraph of his article on Mr. Rood, as originally transmitted by Finney, Jr., read as follows:

> From the Atlantic to the Pacific, Rood has nudged screamers down America's interstates and rural dirt roads. For every person he has hit, he has missed millions, which is quite an accomplishment in 20 years of highway golf, the sport he invented to help solve *the* drug addiction problem. (emphasis added)

At some point after Finney, Jr.'s transmission of the story from the New Orleans UPI office, the underscored word in the above excerpt was altered by a UPI employee from "the" to "a" and finally to "his". The altered version which appeared in the October 4, 1978 edition of the *Houston Chronicle* and other newspapers, read as follows:

> . . . 20 years of highway golf, the sport he invented to help solve *his* drug addiction problem. (emphasis added)

It is this printed version which is the subject of Mr. Rood's lawsuit. Contrary to the statement in the above quoted article, Mr. Rood has never had a drug addiction problem of any kind whatsoever and has furthermore spent most of his adult years *combating* narcotics addiction in young people.

After the publication of this article, Mr. Rood made an appointment with Finney, Jr., to discuss the disputed statement. Mr. Finney, Jr., recalled without a doubt that Mr. Rood had wanted a retraction or clarification. Mr. Finney, Jr., in a written memorandum to another employee of UPI Joey Reaves, stated that he *knew* that Mr. Rood never had a drug problem and that Rood wanted a retraction.

Mr. Finney, Jr., reported his conversation with Mr. Rood to Joey Reaves, UPI bureau manager, and was told that Reaves "would look into it". Mr. Finney, Jr., made no further inquiries as to any action taken by Reaves pertaining to a retraction, nor did Mr. Reaves ever contact Mr. Rood about the article in question.

Mr. Finney, Jr., later wrote another story about Mr. Rood's highway golf, but no attempt was made to clarify or retract the statement in the first article that is at issue here.

It is the publication of the false statement in the October 4, 1978 article and the failure to retract or clarify, after being fully apprised of the defamatory statement that has given rise to the issues in this case.

This is a defamation action brought by a public figure plaintiff against a defendant news organization. As such, the First Amendment Constitutional issue herein presented was raised by the filing of this action in the Civil District Court for the Parish of Orleans, State of Louisiana. The Fourteenth Amendment Constitutional issue was raised by the summary dismissal of this lawsuit.

Plaintiff, Floyd Rood, filed this suit in the Civil District Court for the Parish of Orleans, on August 31, 1979, against Peter Finney, Jr., and United Press International, Inc., requesting damages for defamation of character, mental anguish and emotional distress, as well as attorney's fees and punitive damages.

On October 3, 1980, the defendants (Finney, Jr., and UPI) filed a motion for summary judgment. In a judgment rendered on February 19, 1981, the Honorable Gerald Federoff, Louisiana District Court Judge, granted the defendants' motion for summary judgment and dismissed plaintiff's claim.

A motion and order for devolutive appeal to the Louisiana State Court of Appeal was granted to the plaintiff, Floyd Rood, on March 30, 1981. On June 28, 1982 the Fourth Circuit Court of Appeal affirmed the decision of the District Court.

Plaintiff then sought writs of certiorari and review in the Supreme Court of Louisiana. The Supreme Court of Louisiana denied the plaintiff's application for writ of certiorari on October 8, 1982.

I.

STATEMENT OF REASON FOR THIS COURT TO ISSUE WRIT AND ARGUMENT THEREFOR ON ISSUE NO. I

A resolution of the issues presented herein will eliminate an unfair circumvention of this Court's holding in *Herbert v. Lando.*, 441 U.S. 153 (1979).

This case involves a public figure plaintiff who has brought a defamation action and must prove "actual malice" (i.e. knowledge that the statement was false or reckless disregard of whether it was false or not) to recover. The defendant news organization filed a motion for summary judgment and in support thereof filed affidavits of persons involved in the organization's editorial process. Each affidavit asserted that the affiant could not recall any information regarding the editorial process utilized in the preparation of the article or in the change of the wording to "his drug addiction problem". The defendant then asserted as the primary grounds for summary dismissal that the plaintiff could not determine the defendant's state of mind in making the change and therefore could not prove "actual malice" as required by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1954); and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1975). In other words, plaintiff was presented with the classic catch 22. He could not determine defendant's state of mind because defendant could not or would not recall the relevant events surrounding the publication of the article. Consequently, since defendant did not remember the relevant events surrounding publication of the article, plaintiff could not prove by direct evidence defendant's state of mind and his case was dismissed. The result is outrageously unfair.

The issue herein raised is novel. This Court has clearly held that the public figure plaintiff in a defamation action must prove "actual malice". Yet in this case, the plaintiff was precluded from discovering facts relevant to the defendant's malicious state of mind because the district court granted defendant's motion for summary judgment based solely on the defendant's self-serving affidavits that their employees could not recall the relevant facts surrounding the defamatory publication. It is submitted that the Louisiana district court's dismissal of this case, if allowed to stand, establishes a gaping loophole through which unscrupulous defendants may entirely circumvent this court's rationale and objective as established in *Herbert v. Lando*, 441 U.S. 153. *Herbert* allows the discovery of information regarding the defendant news organization's editorial process and state of mind. This case presents an issue that inextricably arises from the *Herbert* principle. Specifically, should a precedent be established based on the lower Court holdings in this case, future plaintiffs could be precluded from showing actual malice on the part of the individuals responsible for the publication of defamatory articles. Moreover, if as a result, a trial court then grants summary judgment, as occurred herein, the plaintiff is entirely precluded from presenting *any* evidence of actual malice and denied access to the courts. Clearly, such a result, obtained solely by the assertions of individuals who claim loss of memory, circumvents this court's objective as outlined in *Herbert, Butts* and *New York Times*. It is submitted that by following the procedure utilized in this case, a news organization could establish virtual immunity from defamation actions brought by public figures. If all the defendant news organization has to do to obtain summary judgment is submit affidavits which testify to an inability to recall pertinent information, the public

figure plaintiff is effectively precluded from proving his case, though there may be adequate circumstantial evidence of actual malice.

It is respectfully submitted that this court could fashion a remedy to prevent this circumvention of the *Herbert* principle by granting certiorari in this case. This court could clarify the burden placed upon a defendant news organization when moving for summary judgment in a public figure defamation action and require such a defendant to show the *absence of actual malice*, in a situation where its employees are unable to explain the publication of the defamatory statement. Finally, by clearly specifying that such a defendant will bear the burden of showing the absence of malice, this court will prevent its requirements for editorial process and "state of mind" discovery from becoming meaningless concepts; robbed of their validity by the procedural manuevering of ingenious defendants.

II.

STATEMENT OF REASON FOR THIS COURT TO ISSUE WRIT AND ARGUMENT THEREFOR ON ISSUE NO. II

Defendants UPI and Peter Finney, Jr. acted with reckless disregard for the truth when they failed to retract or correct their defamatory statement, irrespective of whether there was actual malice in the initial publication.

Even though *New York Times v. Sullivan* and its landmark principles, are more than sixteen years old many questions produced by that case are yet unanswered or answered only incompletely. One such question is whether a failure to

retract or correct patently erroneous and libelous statements can in-and-of-itself be actual malice, irrespective of the defendant's state of mind or degree of information at the time of the initial publication? *No* case has *answered* this question. Plaintiff maintains that the most supportable answer to that question is *yes.*

The qualified *Times* privilege can be lost when a libelous statement goes uncorrected after the defendant is made aware of the error and recklessly allows the mistake to live on without correction or retraction. The question is: would it have been reckless for the defendant to have published the story if he knew then what he found out when plaintiff requested a retraction? If it would have, then the failure to retract is no less reckless, no less culpable and no more deserving of the protection of the *Times* privilege. UPI of course, did act reckless in publishing the offending statement. Imagine how much more reckless it would have been had the error been clearly pointed out prior to publication and was nonetheless printed. Consequently, the failure to retract is as culpable as if the statement were made with full knowledge of its falsity.

As to Finney, let us assume that his original story did not include the error. Once it is pointed out to him his failure to retract or correct effects a new harm against Mr. Rood. Certainly, as with UPI, had Finney known of the error and published it anyway his assertion of a *Times* privilege would be short-lived at best. Consequently, the failure to retract in light of the clear error, is a new tort recklessly conceived.

The concept of fault by inaction is certainly no stranger to tort. Despite the general hesitation to impose affirmative duties to act many courts have predicated liability upon a

party's failure to act, which exacerbates harm done by another. Let us examine how this would apply to UPI and Finney granting them the most favorable assumption, that is, that they were not reckless in the first instance of publication.

One famous tort case offering a parallel is *Ayres v. Hicks*, 40 N. E. 2d 334 (Ind. 1942), wherein a six-year old child caught his fingers in a department store escalator. In awarding damages to the plaintiff the court admitted that the defendant was faultless in the actual cause of the accident.

> The facts found by the jury conclusively, establish that the appellant was not negligent with respect to the choice, construction, or manner of operating the escalator. . . .[T]he question arises whether it may, nevertheless, be held liable for an aggravation of such injury, and, if so, under what circumstances. *Id* at 336-37

The court went on to admit that there is no general duty to aid one in peril, but that nonetheless circumstances might exist where not to act aggravates harm and is actionable. Consequently, they held the department store liable for the aggravation of the child's injury by not having someone readily available to stop the escalator should an accident occur. The court's generalized principle is most important:

> [I]t may be deduced that there may be a legal obligation to take positive or affirmative steps to effect the rescue of a person who is helpless and in a situation of peril . . . *when the injury resulted from use of an instrumentality under the control of the defendant.* Such an obligation may exist although the accident or original

> injury was caused by the negligence of the plaintiff or through that of a third person and without any fault on the part of the defendant.
>
> Id. at 337.

See also, Depue v. Flotner, 111 N.W. 1 (Minn. 1907) (Duty not to expose one invited into house to danger of cold winter night upon discovering he had been taken ill without fault of defendant); *Tippecano Loan Co. v. Cleveland R. R. Co.*, 104 N.E. 866 (Ind. 1907) (Holding company liable for failing to provide medical assistance to an employee injured without fault of defendant). *Holland v. St. Paul Mercury Ins. Co.*, 135 So.2d 145 (La. App. 1961) (Holding exterminator liable for not knowing contents of poison that plaintiff's child accidentally consumed. Defendants were not at fault in the child's accident, but were responsible for parents' mental suffering because child treatment was delayed and complicated because defendant did not know the poison's contents).

These cases deal with negligence, but recklessness is simply a matter of degree. A jury could certainly determine that defendant's failure to correct or retract *was* reckless and that the duty to retract existed and gave rise to a separate tort.

Recall, also, that the above discussion assumes the defendants' initial innocence *i. e.* freedom from recklessness. This is an assumption *arguendo* and not conceded. In fact, plaintiff alleges that as to UPI there was clear recklessness in the first instance - - exacerbated by not retracting - - and as to Finney plaintiff alleges that malice was shown when he did nothing after meeting with Rood. Obviously, plain-

tiff's argument is that much stronger if either or both defendants are found to be initially reckless.

The view that a failure to retract or correct should constitute a separate tort, though never clearly before any court, finds strong support in the Harvard Law Review article cited below. There the writer strongly supports the view that failure to retract is and should be a separate tort:

> But a failure to retract may have more than an evidentiary effect - - even if the original publication was not made with actual malice, a *Times* defendant may forfeit his privilege if he refuses to retract after a demonstration of the defamatory statement's falsity . . . . Indeed, predicating liability on a refusal to retract seems desirable; a publisher's reticence after falsity has been shown is an intentional rejection of an opportunity to mitigate damages previously inflicted and should result in liability despite the absence of actual malice at the time of publication. In a very real sense, giving currency to a defamatory statement is a knowing or reckless disregard of the truth.
>
> 80 Harvard Law Review 1730 (1967) at 1742.

This comment writer's suggestion is not merely that of an arcane law review speculator. The view he espouses has been directly noted by at least one U.S. Supreme Court Justice. In *Rosenbloom v. Metromedia*, 403 U.S. 29, Justice Brennan, speaking for a plurality of Justices, rejected the argument that private individuals involved in public

events should have an easier burden in proving defamation than public figures. In responding, Justice Brennan said:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than stifling public discussion of matters of public concern.
>
> *Id.* at 47.

In a footnote Justice Brennan made quite clear the significance he attached to retractions as a means of preventing harm when he noted that "[s]ome States have adopted retraction statutes or right-of-reply statutes." *Id.* at 47 N. 15. But, more important, Justice Brennan cited the Harvard Law Review article discussed above as one offering comprehensive insight into the retraction question. Consequently, that article possesses additional significance in deciding the failure to retract question.

Similarly, Justice Powell has emphasized that "[t]he first remedy of any victim of defamation is self-help - - using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation". *Gertz v. Welch*, 418 U.S. 323 at 340. Of course the "self-help" referred to is requests for retractions or correction. Once this remedy has been recklessly denied a separate tort has been committed. Such is the instant case. U.P.I. and Mr. Finney were clearly made aware of the blatant and libelous error included in their article; even an unreasonable person would have sought to correct harm so obviously and unjustifiably done. In the end only a reckless person would have failed to act and act promptly because "[i]n

a very real sense, giving currency to a defamatory statement is a knowing or reckless disregard of the truth". 80 Harv. L. Rev. at 1742.

Furthermore, Defendants U.P.I. and Peter Finney, Jr., acted recklessly by publishing a subsequent story about plaintiff, Rood, without retracting or correcting the initial error.

The second Finney article about Rood came at a time when he and U.P.I., who circulated the second article, knew of the initial error and failed to correct it. This conclusion is amply demonstrated by Mr. Finney's deposition:

At page 35 and 36 of his deposition Finney admitted knowing about the error about two or three days after it was written. Then on page 46 he said:

> Q. Let's start off with have you written any other articles about Mr. Rood other than the article that was produced as Exhibit Number 2?
>
> A. Yes.
>
> Q. All right. When did you write those other articles, or article?
>
> A. It might have been a month later, a very short time later. It was when he hit a golf ball off the Hyatt Hotel, I did a story on that, covering the event. Other than that, that's the only - - this story and that story were the only two stories that I have written.

Even assuming arguendo that all of the other actions of the defendants are less than reckless, can it reasonably be said that failing to correct the error when an opportunity clearly presented itself is not reckless? Surely the answer must be no. What could we say of one who publishes a clearly incorrect and libelous story, is then made aware of the error, but fails to retract it and then heaps insult upon injury by writing another story and completely ignoring the first error and letting it stand as fact? We could only say: outrageous! Or, more important, reckless!

Additionally, because this opportunity was missed, it calls more vividly into question the state of mind of the author and disseminator. What were they thinking when they knowingly rejected an opportunity to make amends? Did they consider the prior error, its consequences and their responsibility? Was their attitude "let him eat cake"? Did they consider contacting Mr. Rood for his feelings about what should be included in the second article?

All of these are fact questions. Moreover, there are state of mind fact questions that are always relevant in defamation cases, and which seldom lend themselves to summary judgment. Accordingly, summary judgment should have been denied.

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing a copy thereof in the U.S. Mail, postage prepaid, to the following:

J. David Forsyth
Attorney at Law
601 Poydras Street
Suite 2500
New Orleans, LA 70130

DATED JANUARY 6th, 1983.

APPENDIX I

CIVIL DISTRICT COURT FOR THE PARISH OF
ORLEANS, STATE OF LOUISIANA
DIVISION "E"

NO. 79-13218
DOCKET NO. 4

FLOYD ROOD

VS.

PETER FINNEY, JR. ET AL

JUDGMENT

Defendants' motion for summary judgment is granted and plaintiff's action is dismissed at his costs.

JUDGMENT READ, RENDERED AND SIGNED this 19th day of February, 1981.

/s/ Gerald P. Fedoroff
JUDGE

APPENDIX II

NO. 13023

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

FLOYD ROOD

VS.

PETER FINNEY, JR. and
UNITED PRESS INTERNATIONAL,
INCORPORATED

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, NO. 79-13218,
HONORABLE GERALD P. FEDOROFF, JUDGE

JIM GARRISON
JUDGE

(Court composed of Judges James C. Gulotta, Jim Garrison and Denis A. Barry)

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AFFIRMED

DATED: June 28, 1982

In August, 1979 plaintiff-appellant Floyd Rood filed this suit against United Press International (UPI) and Peter Paul Finney, Jr., a UPI staff reporter in New Orleans. Plaintiff sought $310,000.00 in damages for a statement printed in one version of a UPI news article, the original of which was written by Finney, concerning Rood's unusual fund raising activities. The particular version of the news story involved was one of several rewrites done by the Dallas regional office of UPI, which appeared in the Houston Chronicle on October 4, 1978. Mr. Rood, a professional golfer, had been involved in unique and well -publicized golf activities since the 1950's when he formed the "Floyd Rood Youth and Sports Foundation," a tax-exempt organization devoted to his youth assistance work. A major involvement of his, over these years, was "highway golf." In this activity, seeking substantial publicity for the project, Mr. Rood would embark on a cross-country tour, during the course of which he would hit golf balls across land and water. Money for the foundation would be raised from sponsors who would contribute a particular amount for each yard covered or who would purchase the golf balls used during the cross-country tour.

It was apparent that publicity was essential to this fund-

raising operation. Rood employed advance men and public relations personnel to promote his activity in order to insure that he received the attention required in order to raise money for the fund. On one such golf tour, a clipping service counted over 350 newspapers reporting his activities. Rood had appeared on television and radio shows, had been featured in national magazines, and had been the subject of a book. The news article at issue in this case was originally written by Finney on October 3, 1978, at the beginning of one of Rood's "highway golf" tours. The proceeds of this particular tour were going to be used to purchase trailers which would provide information concerning drug rehabilitation.

In connection with this tour, Finney interviewed Rood and subsequently typed his story into a video display terminal in the New Orleans office of UPI. Rood's many fund raising campaigns over the previous 20 years were discussed. The news story stated that Rood was about to begin "his last hurrah, a 7.5 million-yard trek from New Orleans to Shelby, Montana, by way of Los Angeles." Finney's news story went on to explain that the money raised would help fulfill Rood's dream of equiping 50 trailers with anti-drug abuse exhibits.

The third paragraph of the story, as originally typed and transmitted by Finney, read:

> "From the Atlantic to the Pacific, Rood has nudged screamers down America's interstates and rural dirt roads. For every person he has hit, he has missed millions, which is quite an accomplishment in 20 years of highway golf, the sport he invented to help solve *the* drug addiction problem." (emphasis supplied)

Finney then transmitted the article by computer command over telephone lines to the UPI office in Dallas, which was the regional editing center for UPI. At some point subsequent to Finney's transmission of the story from the New Orleans UPI office to Dallas its wording was altered. In one version of the article, the foregoing paragraph stated that "highway golf" was a sport invented by Rood to help solve "*a* drug problem." In another version of the article - and the version which is the subject of this particular litigation - which appeared in the Houston Chronicle, the concluding sentence appeared as follows ". . . highway golf, the sport he invented to help solve *his* drug addiction problem."

Following the appearance of the story, as indicated, in the Houston Chronicle, Rood visited Finney in the UPI office in New Orleans where he objected to the news article's use of the word "his" in connection with the subject of drug addiction. Inasmuch as that word had not been used by Finney in his original article, his reaction was one of surprise. He then wrote an additional story on the subject, describing Rood's latest publicity campaign and praising his efforts to fight drug abuse in the United States. This follow-up story underscored the fact that Rood was hosting an "anti-drug addiction tournament" and that all of the proceeds on this tour would "help pay for his dream of 50 drug rehabilitation trailers."

Mr. Rood may have requested some sort of clarification when he met with Finney, although he does not remember that. Neither Rood nor his attorneys ever wrote defendants requesting a retraction of any statement made in the initial article. Consequently, there is not for the record any evidence of a formal retraction demand. Following Rood's visit to Finney, neither Rood nor his attorney contacted

the news service until this lawsuit was filed in August, 1979.

In October, 1980 the defendants moved for summary judgment, which was granted by Judge Fedoroff on February 19, 1981. On April 15, 1981 the court granted Rood's motion for summary judgment with respect to UPI and Finney's reconventional demand for attorney's fees and costs, except with respect to court costs, and partially denied defendants' motion to tax costs and attorney's fees.

Because of the primacy of our concerns for freedom of the press and freedom of speech, the constitutional standards of the United States and the State of Louisiana exercise a threshold impact on this case. Thus Mr. Rood, clearly discernible as a "public figure", was required to establish with convincing certainty that Mr. Finney and United Press International acted with *actual* malice - which is to say, with knowledge of falsity or with reckless disregard of the truth. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

With regard to the practicability and efficacy of summary judgments when defamation actions are brought against news media, Louisiana has clearly recognized that such defendants are entitled to this remedy where plaintiffs clearly are unable to establish a prima facie case. The summary disposition is an "effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten the free exercise of rights of speech and press." *Mashburn v. Collin*, 355 So.2d 879, 891 (La. 1977). See also *Shaefer v. Lynch*, 406 So.2d 185, 187 (La. 1981), in which the Louisiana Supreme Court held that such a defendant "is *constitutionally* entitled to summary dismissal of a libel suit unless plaintiff can show malice." (emphasis supplied)

As the trial judge clearly recognized, the case at bar fell well within these parameters and its disposition of the plaintiff's suit by summary judgment was proper. The judgment below is therefore affirmed.

AFFIRMED

APPENDIX III

THE SUPREME COURT OF THE STATE OF LOUISIANA

FLOYD ROOD

VERSUS

PETER FINNEY, JR., AND UNITED PRESS INTERNATIONAL INC.

82-C-1903

Re: Floyd Rood, applying for Writ of Certiorari, Parish of Orleans, Fourth Circuit Court of Appeal, Civil District Court, No. 13023.

October 8, 1982

Denied.

JAD
PFC
WFM
JLD
FAB
JCW
HTL

Supreme Court of Louisiana
October 8, 1982

/s/ Frans J. La Branche, Jr.
Clerk of Court
For the Court

Office-Supreme Court, U.S.
FILED
FEB 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLOYD ROOD, *Petitioner*,

v.

PETER FINNEY, JR., and
UNITED PRESS INTERNATIONAL, INC., *Respondents*.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff in a civil action is deprived of any right arising from the Constitution or federal law when, after a motion for summary judgment is granted following ample opportunity for discovery, a state court rejects the plaintiff's allegation that he was prevented from establishing the existence of disputed material facts?

2. Whether the plaintiff in a civil action is deprived of any right arising from the Constitution or federal law when a state court declines to recognize a novel cause of action based on failure to retract an allegedly defamatory falsehood?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1178

FLOYD ROOD, *Petitioner*,

v.

PETER FINNEY, JR., and
UNITED PRESS INTERNATIONAL, INC., *Respondents*.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION

Respondents, Peter Finney, Jr. ("Finney") and United Press International, Inc. ("UPI"), respectfully pray that the instant Petition be denied. Review in this Court is inappropriate because Petitioner, Floyd Rood ("Rood"), fails to allege that the judgment below raises any question for review arising from the Constitution or laws of the United States. *See* 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Despite the several misleading and erroneous statements contained in the Petition, the material facts, as set forth by the Louisiana Fourth Circuit Court of Appeal are uncontroverted:

> In August, 1979 plaintiff-appellant Floyd Rood filed this suit against United Press International

(UPI) and Peter Paul Finney, Jr., a UPI staff reporter in New Orleans. Plaintiff sought $310,000.00 in damages for a statement printed in one version of a UPI news article, the original of which was written by Finney, concerning Rood's unusual fund raising activities.[1] The particular version of the news story involved was one of several rewrites done by the Dallas regional office of UPI, which appeared in the Houston Chronicle on October 4, 1978. Mr. Rood, a professional golfer, had been involved in unique and well-publicized golf activities since the 1950's when he formed the "Floyd Rood Youth and Sports Foundation," a tax-exempt organization devoted to his youth assistance work. A major involvement of his, over these years, was "highway golf." In this activity, seeking substantial publicity for the project, Mr. Rood would embark on a cross-country tour, during the course of which he would hit golf balls across land and water. Money for the foundation would be raised from sponsors who would contribute a particular amount for each yard covered or who would purchase the golf balls used during the cross-country tour.

It was apparent that publicity was essential to this fund-raising operation. Rood employed advance men and public relations personnel to promote his activity in order to insure that he received the attention required in order to raise money for the fund. On one such golf tour, a clipping service counted over 350 newspapers reporting his activities. Rood had appeared on television and radio shows, had been featured in national magazines, and had been the subject of a book. The news article at issue in this case was originally written by Finney on October 3, 1978, at the beginning of one of Rood's "highway

[1] The Petition filed in the trial court alleged a cause of action for defamation. It did not allege a separate cause of action arising from UPI's or Finney's alleged failure to publish a retraction.

golf" tours. The proceeds of this particular tour were going to be used to purchase trailers which would provide information concerning drug rehabilitation.

In connection with this tour, Finney interviewed Rood and subsequently typed his story into a video display terminal in the New Orleans office of UPI. Rood's many fund-raising campaigns over the previous 20 years were discussed. The news story stated that Rood was about to begin "his last hurrah, a 7.5 million-yard trek from New Orleans to Shelby, Montana, by way of Los Angeles." Finney's news story went on to explain that the money raised would help fulfill Rood's dream of equipping 50 trailers with anti-drug abuse exhibits.

The third paragraph of the story, as originally typed and transmitted by Finney, read:

> "From the Atlantic to the Pacific, Rood has nudged screamers down America's interstates and rural dirt roads. For every person he has hit, he has missed millions, which is quite an accomplishment in 20 years of highway golf, the sport he invented to help solve *the* drug addiction problem." (emphasis supplied).

Finney then transmitted the article by computer command over telephone lines to the UPI office in Dallas, which was the regional editing center for UPI. At some point subsequent to Finney's transmission of the story from the New Orleans UPI office to Dallas its wording was altered. In one version of the article, the foregoing paragraph stated that "highway golf" was a sport invented by Rood to help solve "*a* drug problem." In another version of the article—and the version which is the subject of this particular litigation—which appeared in the Houston Chronicle, the concluding sentence appeared as follows ". . . highway golf, the sport he invented to help solve *his* drug addiction problem."

> Following the appearance of the story, as indicated, in the Houston Chronicle, Rood visited Finney in the UPI office in New Orleans where he objected to the news article's use of the word "his" in connection with the subject of drug addiction. Inasmuch as that word had not been used by Finney in his original article, his reaction was one of surprise. He then wrote an additional story on the subject, describing Rood's latest publicity campaign and praising his efforts to fight drug abuse in the United States. This follow-up story underscored the fact that Rood was hosting an "anti-drug addiction tournament" and that all of the proceeds on this tour would "help pay for his dream of 50 drug rehabilitation trailers."
>
> *Mr. Rood may have requested some sort of clarification when he met with Finney, although he does not remember that. Neither Rood nor his attorneys ever wrote defendants requesting a retraction of any statement made in the initial article. Consequently, there is not for the record any evidence of a formal retraction demand. Following Rood's visit to Finney, neither Rood nor his attorney contacted the news service until this lawsuit was filed in August, 1979.*[2]

After Finney and UPI filed an Answer to the Petition, both sides were afforded more than a year to undertake discovery. Rood deposed Finney and UPI reporter Joseph Reaves, who was flown back to New Orleans by UPI from covering the Iran-Iraq war. In addition, Finney and UPI answered Rood's interrogatories and complied with his requests for production of documents. Rood made no other requests for discovery, despite ample opportunity to do so.

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[2] *See* Rood v. Finney, No. 13023, at A-3 - A-6 (La. Ct. App. 4th Cir. June 28, 1982) (emphasis added) [hereinafter cited as *Rood* with page citations to Appendix to the Petition for Writ of Certiorari].

On October 3, 1980, Finney and UPI moved for summary judgment pursuant to *La. Code Civ. Proc.* art. 967. Summary judgment was granted on February 19, 1981, by the trial court and unanimously affirmed by the Fourth Circuit Court of Appeal on June 28, 1982. At oral argument before the court of appeals, Rood for the first time alleged that he had been prevented from developing relevant evidence in the trial court.[3] The Louisiana Supreme Court unanimously denied Rood's petition for a writ of certiorari on October 8, 1982. Thus, all ten Louisiana state court judges that have considered the instant case have concluded that Rood's claims are without merit.

REASONS FOR DENYING THE WRIT

REVIEW IN THIS COURT IS INAPPROPRIATE BECAUSE ROOD FAILS TO ALLEGE THAT THE JUDGMENT BELOW RAISES ANY QUESTION FOR REVIEW ARISING FROM THE CONSTITUTION OR LAWS OF THE UNITED STATES.

A. Discovery.

Rood alleges that he was prevented by Finney and UPI from discovering evidence that would create a disputed issue of material fact on the issue of constitutional malice.[4] According to his Petition for Writ of Certiorari, Rood was allegedly prevented from obtaining evidence because Finney and UPI "could not or *would not* recall the relevant events."[5]

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[3] Letter from Counsel for UPI to Fourth Circuit Court of Appeal (May 28, 1982).

[4] Throughout this litigation, Rood has conceded that he is a public figure. Petition for Writ of Certiorari at 6; Memorandum in Opposition of [sic] Motion for Summary Judgment at 5 (Dec. 2, 1980).

[5] Petition for Writ of Certiorari at 6 (emphasis added).

These allegations are wholly unsupported by the record below. Any failure to undertake discovery was solely by the choice (or neglect) of Rood. The record demonstrates that Finney and UPI provided Rood with the detailed affidavits of the four UPI employees that may have participated in the preparation of the UPI dispatch at issue. Despite ample opportunity, Rood chose to depose only one of those four individuals—Finney—who was voluntarily made available. On Rood's request, UPI voluntarily produced for deposition Joseph Reaves, a UPI reporter, who was flown to New Orleans by UPI while in the midst of covering the Iran-Iraq war. In addition, Finney and UPI fully answered Rood's interrogatories and complied with his requests for production of documents.

The record is devoid of any indication that Rood sought to depose any other employee of UPI or that UPI or Finney refused to comply with any discovery requests. To the contrary, UPI and Finney were wholly cooperative.[6] Rood voluntarily elected not to go to the expense of further discovery when he had the opportunity to do so. Indeed, Rood did not raise the issue of his alleged in-

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[6] Rood's unsupported suggestion that UPI and Finney have deliberately withheld relevant evidence from the courts below is, at best, decidedly unprofessional. *See* Petition for Writ of Certiorari at 7-8. In fact, the Dallas UPI office, where the dispatch at issue was disseminated, handles hundreds of news stories during each twelve-hour news cycle, and any individual staffer would work on a substantial portion of those stories. Despite diligent efforts by UPI to discover exactly when, how, and by whose action the changes in the dispatch's wording occurred, no additional evidence has come to light nor will there ever be any additional evidence. All of the pertinent evidence that will ever be available has been adduced and was thus considered by the Louisiana courts.

ability to obtain evidence until oral argument before the court of appeals.

The proper conduct of discovery is an issue to be resolved under Louisiana law. Louisiana courts have denied requests by parties opposing motions for summary judgment for additional time to undertake discovery where, as here, the failure to present evidence in a timely manner resulted from no more than a lack of diligence, *Fidelity National Bank* v. *Coleman American Moving Services, Inc.*, 398 So. 2d 556 (La. App. 1st Cir. 1980), or where the record does not show that any continuance was requested or denied by the trial court, *Farrar* v. *Swedish Health Spa*, 337 So. 2d 911 (La. App. 3d Cir. 1976). This doctrine of state law is even more applicable when an objection to the conduct of discovery is raised for the first time on appeal. Although Rood asserts, without supporting authority, that his alleged inability to obtain evidence somehow infringes his rights under the First Amendment, the Louisiana courts' application of state law governing the conduct of discovery establishes no basis for Rood to assert a claim arising under the federal Constitution.

Article 967 of the Louisiana Code of Civil Procedure sets out the strict factual requirement for defeating a motion for summary judgment under state law:

> When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth *specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. (Emphasis added).

Rood has failed to provide any counter affidavits or other evidence that raises a disputed issue of material fact.

Under Louisiana law, Rood's failure to raise, by affidavits, depositions or other evidence, a single disputed factual issue is a sufficient basis upon which to grant a motion for summary judgment. *Cates* v. *Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367, 369 (La.), *cert. denied*, 429 U.S. 833 (1976); *Schaefer* v. *Lynch*, 406 So. 2d 185 (La. 1981); *Mashburn* v. *Collin*, 355 So. 2d 879 (La. 1977). The mere possibility that Rood might have been able to raise a factual issue will not defeat a motion for summary judgment under Louisiana Law. *Mexican Gulf Fisheries, Inc.* v. *Aetna Insurance Co.*, 220 So. 2d 141 (La. App. 1st Cir. 1969).

Accordingly, summary judgment was properly granted under the laws of Louisiana and Rood has failed to raise a question for review that arises under the Constitution or laws of the United States.

B. Failure to Retract.

Rood further alleges that the courts below improperly declined to recognize an independent cause of action based on Finney's and UPI's failure to publish a retraction. Although Rood's allegations in this regard are admittedly unclear, he appears to assert that the failure to publish a retraction with reckless disregard for the truth ought to constitute an actionable tort "irrespective of whether there was actual malice in the initial publication."[7]

Once again, Rood's novel legal theory is devoid of a factual basis in the record below. It is undisputed that Rood at no time formally requested a retraction.[8] Indeed, UPI, at Rood's request, published a second news report

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[7] Petition for Writ of Certiorari at i.

[8] *Rood* at A-5.

that made it clear that Rood did not have a drug-abuse problem.[9] Given Rood's failure to demand a retraction and UPI's prompt publication of another story, at Rood's request, it is difficult to discern in what manner Rood can now allege that either Finney or UPI acted with constitutional malice by failing to publish a retraction.

In addition, Rood's apparent attempt to have this Court create a novel tort must fail because the claim was nowhere alleged in his original Petition in the trial court and because such a tort simply does not exist under Louisiana law. The Petition filed in the trial court reveals that the only action sued upon sounded in defamation and was based solely on a publication dated October 4, 1978.[10] There is not one word mentioned in the Petition of any failure to retract or of any events whatever subsequent to October 4, 1978. Moreover, the existence of a cause of action based on UPI's and Finney's alleged failure to retract must be resolved under applicable state law, of which the Louisiana courts are the final arbiters. The recognition or nonrecognition of a remedy arising under state law raises no issue of federal law for consideration by this Court. Since the Louisiana courts have considered and rejected Rood's theory of tort liability, there is no basis for review in this Court.[11]

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[9] *Id.*

[10] *Id.* at A-3.

[11] Unlike the states referred to on page 13 of Rood's Petition for Writ of Certiorari, Louisiana has not promulgated a right-of-reply statute.

CONCLUSION

For the foregoing reasons, Finney and UPI respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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